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IN THE

Supreme Court of the United States

October Term, 1963.

No. 876.

EDNA VAN DER SCHELLING,
Petitioner,

v.

U. S. NEWS & WORLD REPORT, INC.,
Respondent.

PETITION OF EDNA VAN DER SCHELLING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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U. S. NEWS & WORLD REPORT, INC.,

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PETITION OF EDNA VAN DER SCHELLING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Edna Van Der Schelling, petitioner, prays that a writ of certiorari, issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 5, 1963.

OPINIONS BELOW.

The opinion of the District Court is reported in 213 F. Supp. 756. It is also printed in the "Joint Appendix"[1] at pages 31a-44a.

The opinion of the Court of Appeals has not yet been reported. A copy is appended to this petition, as Appendix A (*infra*, p. 9).

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1. A Joint Appendix was filed in the court below. A certified copy of this appendix and 9 additional copies thereof, have been filed with this petition in accordance with Rule 21 of this Court. All references to the Joint Appendix are designated "JA".

JURISDICTION.

The judgment of the Court of Appeals was entered on December 5, 1963. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646(1), 62 Stat. 928(1), 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Does the establishment of a domicile in the Republic of Mexico, prior to the institution of suit, by the petitioner, who is an American citizen, constitute the petitioner a "subject" of Mexico so that the requisite diversity of citizenship may exist for the maintenance of a Civil Action for defamation in the Federal Court?

STATUTE INVOLVED.

The statute involved is 28 U. S. C. § 1332(a)(2), which provides:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between:
>
> (2) Citizens of a State, and foreign states or citizens or subjects thereof;"

STATEMENT OF THE CASE.

This is a diversity suit brought to recover damages for a libel.

The petitioner in this case is a citizen of the United States, and for the eleven years preceding the institution of her action was a resident of the Republic of Mexico. She is presently residing in Mexico. The respondent is a corporation organized under the laws of the State of Delaware, with its principal place of business in the District of Columbia (JA 5a).

In the September 19, 1960, issue of respondent's weekly magazine, "U. S. News & World Report", an article appeared entitled "The Underground Railroad to Russia". In that article the petitioner was named as a member of a so-called "American Communist Colony in Mexico" (JA 5a) and was accused of participating in conspiratorial activities designed to aid certain "defectors" from the United States "escape" to the Soviet Union and Cuba.

Petitioner's suit was brought seeking compensatory and punitive damages for this libel on her by the respondent. In her Complaint, the petitioner averred that she is a citizen of the United States and a resident of the Republic of Mexico (JA 4a).

The respondent originally filed a motion for summary judgment averring that, because petitioner, a native born citizen of the United States, has been continuously residing in Mexico since 1950, she is not a citizen of any state within the Federal Union and therefore cannot maintain her action because no diversity of citizenship exists between the parties (JA 12a). The respondent subsequently changed its Motion for Summary Judgment to a Motion to Dismiss for lack of diversity of citizenship. The grounds, however, remained unchanged.

The facts, as testified to by the petitioner on her deposition, establish that the petitioner went to Mexico in 1950

from Los Angeles, California, where she married. In 1951, she commenced employment as a music teacher in an American school in Mexico, which employment lasted until 1960, when she was discharged by the school authorities because of the article on which this suit is based. Real property which the petitioner owned in California was sold in 1964, after the commencement of her action. Petitioner has a United States Passport (JA 24a).

In order to defeat the jurisdiction of the District Court, the respondent filed an affidavit by Edward Hidalgo, an attorney at law practicing in Mexico City (JA 16a). Taking the petitioner's deposition testimony as the factual basis for his opinion on the Mexican law, Senor Hidalgo gave his opinion on petitioner's present status under the law of Mexico. In his opinion, petitioner presently occupies, what is described as an "inmigrada" status in Mexico. Her earlier status was that of "inmigrante" which he defines as ". . . a foreigner who enters the country legally . . . for the purpose of residing therein until he acquires the status of 'inmigrado'" (JA 18a).

The petitioner became an "inmigrado" after continuous residence in Mexico for a five-year period preceding the filing of her application for the status of "inmigrado".

An "inmigrado" is defined under Mexican law as ". . . a foreigner who acquires the right of definitive residence in the country." Such a person has "the permanent right to live in Mexico" and ". . . without authorization of the Ministry of Government, to change from one employer to another, from one activity to another . . . , or to be idle . . ." According to Senor Hidalgo, respondent's expert on Mexican law:

> "The basic concept under Mexican law of both the inmigrante status and the inmigrado status is that the foreigner who obtains such status intends to reside permanently in Mexico. The grant of inmigrante status on an annually renewable basis for an initial

"five-year period gives permission to work for a specific employer, as authorized by the Ministry of Government, and hence is a status conditioned upon the continuation (as annually established) of such employment. After his five year period the permanence of the foreigner's residence in Mexico is considered sufficiently established to warrant official governmental recognition of it by an award of the definitive and unconditional inmigrado status and the substantial rights of permanent residence and virtual freedom of activity or inactivity accorded to a foreigner who possesses such status."

Based on this affidavit of Senor Hidalgo (JA 16a-19a) and the law of the United States, the petitioner resisted the Motion to Dismiss her action on the ground that the description of her status given in that affidavit established a dual status—a citizen of the United States and a "subject" of Mexico, and that in the latter capacity she is entitled to maintain her action. Leave was asked by the petitioner to amend her Complaint to set forth this status, but this was denied by the District Court, and the action dismissed on the ground that there was a failure of diversity between the parties, and, thus no jurisdiction in the Court to hear the cause.

The Court of Appeals (Judges Kalodner, Hastie and Ganey) heard argument on November 18, 1963. On December 5, 1963, the Court of Appeals, in a per curiam opinion, affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. By its decision the Court below has foreclosed an American citizen, domiciled abroad, from instituting suit in a Federal Court on a transitory cause of action for a published libel, on the ground that foreign domicile negates state citizenship, which is predicated on residence, and therefore, vitiates the requisite diversity of citizenship necessary for federal jurisdiction.

In *Pemberton v. Colonia*, 290 F. 2d 220 (3rd Cir., 1961), the Court of Appeals held, on facts similar to the instant action, that an American citizen domiciled in Mexico does not become, by virtue of such domicile, a citizen of Mexico. The specific question raised here was never considered, but this did not prevent one commentator from noting that the holding in *Pemberton, supra*, has been ". . . to preclude American citizens domiciled abroad from instituting diversity actions in the Federal courts. [And] that under this view aliens have greater rights of access to American Federal courts than United States citizens domiciled abroad." Note, 19 Wash. & Lee, L. R. 78, 79, Spring 1962.

The District Court's reasoning in this case makes state citizenship an absolute for diversity purposes even though it recognizes that "domicile may impress one with the characteristics of a subject of the place of domicile for commercial purposes" (JA 34a). The Court advances the novel theory that national status depends upon what one is doing rather than where one resides or lives, and thus imports into national and international law the unknown entity of "nationality by occupation". From this, only confusion and uncertainty can result.

2. The decision, as the District Court recognized, involves "an important question of federal jurisdiction"

(JA 33a) and it is one which should be, but has not been settled by this Court.[2]

Whether petitioner is, by virtue of her foreign domicile, a "subject" and can properly bring suit in the federal district court under 28 U. S. C. 1332(a)(2), raises a serious question of federal jurisdiction. For the court below, by refusing to regard petitioner as a "subject", has closed the door on what may well be the one tribunal that petitioner could resort to. Having given up her residence in California, she was as to the courts of that state an outsider; remaining an American citizen, the Courts of Mexico would look upon her no differently. Thus, the one tribunal which was open to her in any meaningful sense was the federal court.

3. The decisions of this Court in *The Venus*, 8 Cranch. (12 U. S.) 253 (1814); *Murray v. Schooner "Charming Betsy"*, 2 Cranch. 64; *The Pizzaro*, 2 Wheat. (U. S.) 227; and, *Carlisle v. United States*, 16 Wall. 147, 83 U. S. 147 (1872), recognized that under the law of nations, as well as that of the United States, a person may, by domicile alone, become the "subject" of another nation while still retaining his original citizenship.

The thrust of these decisions is cast aside by the court below in favor of treating the terms "citizen" and "subject" alike even though it appears plain that each word in the statute has a significant and different meaning. See *United States ex rel. D'Esquiva v. Uhl*, 137 F. 2d 303, 305 (2d Cir., 1943).

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2. In *Wildes v. Barber*, Fed. Cas. No. 17,652 (D. Mass. 1839) Justice Story, sitting as a Circuit Judge, was confronted with a situation nearly similar to the matter sub judice. Without deciding the point he noted (pp. 1225-1226) that it would be ". . . desirable to have the opinion of the supreme court upon the point." The question was certified to this Court for its opinion, but the Court was equally divided in its opinion and the case was thus remanded back to the Circuit Court by Chief Justice Taney.

4. Furthermore, if the court below is correct, and the Federal judicial forum is not available to an American citizen domiciled abroad, then certainly one vital attribute of citizenship has been lost by such citizen and the citizen thereby more closely approximates the status of a stateless person criticized by this Court in *Kennedy v. Mendoza-Martinez*, 372 U. S. 144 (1963).

CONCLUSION.

The question presented by this case is a new question and one of great importance. It involves an important area of federal jurisdiction not heretofore considered by this Court, and, certainly one which vitally affects the large numbers of United States citizens domiciled in foreign countries. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,394.

EDNA VAN DER SCHELLING,
Appellant,

v.

U. S. NEWS & WORLD REPORT, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued November 18, 1963.
Before KALODNER, HASTIE and GANEY, *Circuit Judges*.

Opinion of the Court.

(Filed December 5, 1963).

PER CURIAM.

On review of the record we find no error. The Judgment of the District Court will be affirmed for the reasons so well stated by Judge Joseph S. Lord, III, in his excellent opinion, reported at 213 F. Supp. 756 (E. D. Pa. 1963).

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed February 4, 1963, in this case be, and the same is hereby affirmed, with costs.

December 5, 1963.